FOR ARGUMENT

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In The

Supreme Court of the United States

October Term, 1990

RICHARD L. CHAPMAN, JOHN M. SCHOENECKER, and PATRICK BRUMM,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONERS

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ARGUMENT

I. AN LSD CARRIER IS NOT A "MIXTURE OR SUBSTANCE CONTAINING" LSD

As Judge Posner lamented in dissent, "the Justice Department cannot explain the *why* of the punishment scheme it is defending." J.A. 79 (Posner, J., dissenting) (emphasis added). The Government raises a number of arguments in its effort to preserve a system that guarantees arbitrary punishments, but it still has not explained *why* the law should be interpreted to require equally culpable, identically situated offenders to serve vastly different sentences for LSD distribution, depending on the weight or absence of an LSD carrier. Since LSD is sold by the dose, not by weight, and since the weight of the particular carrier chosen by the dealer bears no rational relationship to that person's culpability or moral fault, basing a sentence on the weight of an LSD carrier makes "about as much sense as basing punishment on the weight of the defendant." J.A. 78 (Posner, J., dissenting). *Why* would Congress want to punish a seller of 1,000 doses of LSD adhered to blotter paper more severely than an identical seller of 1,000 doses of LSD adhered to gelatin capsules? The Government cannot answer the question, because no rational explanation can be invented to support that interpretation of the law.

In its attempt to justify this senseless interpretation, the Government has adopted inconsistent positions. On the one hand, the Government argues that the plain language of 21 U.S.C. § 841(b)(1) must be followed. On the other hand, the Government acknowledges that a literal reading of the statute is absurd, and seeks to engraft an "ingestibility" requirement onto the law. Neither position withstands careful analysis.

A. The Words "Mixture or Substance Containing" LSD Are Ambiguous

The Government argues that "the statute makes it quite clear that if a drug and the carrier medium together can be considered a 'mixture or substance,' it is the gross weight of the drug and the carrier medium that determines the applicable penalty, not the weight of the pure drug that may be

contained in the carrier medium." Gov't Br. 12. Yet 21 U.S.C. § 841(b)(1) makes no reference to a "carrier medium," and it is not at all clear, by reference to the language of the statute itself, that Congress intended a carrier to be a "mixture or substance containing" LSD. Heroin carriers (such as syringes) and cocaine carriers (such as vials and valises) do not determine federal sentences. The Government identifies no purpose the statute would serve by treating LSD carriers differently.

The plain meaning of the phrase "mixture or substance containing" LSD excludes LSD carriers from sentencing calculations. The blotter paper to which LSD is adhered is not a "mixture" with the LSD. A "mixture" consists of two substances blended together so that the particles of one are diffused among the particles of the other. 9 *Oxford English Dictionary* 921 (1989). Placing a microdot of LSD in the center of a square of blotter paper is not a "mixture," since the LSD is not evenly diffused throughout the paper. Spraying blotter paper with LSD causes the LSD to cling to the surface of the paper, but the LSD does not "mix" with the paper.

Nor, in the technical sense in which the statute was intended to be read, is the combination of blotter paper and LSD a "substance" that contains LSD. A "substance" is a "chemical element or compound." *Hawley's Condensed Chemical Dictionary* (11th ed. 1987). Paper is not an "element," such as hydrogen or iron, although it is composed of elements. A "compound" consists of "two or more elements chemically combined in fixed proportions." *Webster's New World Dictionary* 291 (2d ed. 1972). A compound is distinguished from a mixture "in that the constituents of a compound lose their individual characteristics and the compound has new characteristics." *Id.* Paper is a compound, a joining of elements to create a new substance with unique characteristics, but it does not "contain" LSD. Adding LSD to blotter paper does not create a new substance. The LSD and the blotter paper retain their separate identities as two separate substances. One does not "contain" the other; LSD adhered to blotter paper is not *contained* within the substance

known as blotter paper. Blotter paper contains various elements, such as carbon and oxygen; LSD is not among them.

These considerations, among others, prompted the *Healy* court to rule that an LSD carrier is *not* literally a "mixture or substance containing" LSD. *United States v. Healy*, 729 F.Supp. 140 (D.D.C. 1990). The strict chemical definitions of "mixture or substance" are the only ones that save the statute from absurdity.

It is true, as the Government argues, that the words "mixture" and "substance" may be given a construction that is "broad enough to include" LSD carriers. Gov't Br. 18. If this construction is adopted, the words are also broad enough to include a vial, a suitcase, or a car that "contains" LSD. The Government suggests that this is not a failing, that the statute demonstrates "breadth" rather than ambiguity. Gov't Br. 21. Yet it is precisely the "breadth" of the statute that renders it ambiguous, and only a narrowing construction can save it from absurdity. Because the Government's reading of the plain language of the statute encompasses vials, suitcases, cars, syringes, shirt pockets, and any other "substance" that might "contain" LSD, this could not have been the meaning intended by Congress.

By agreeing that some substances containing LSD are excluded from the phrase "mixture or substance" – including vehicles and vials – the Government has confessed that its "broad" interpretation of the phrase "mixture or substance containing" LSD is incorrect. The phrase is most rationally given a literal reading that excludes LSD carriers. At best, the phrase may be ambiguous, requiring resort to indicia of legislative intent beyond the words themselves. Yet the Government defends its reading of the statute by importing a concept of "ingestibility" wholly foreign to the text of the statute. The Government argues that "mixture or substance" means "ingestible mixture or substance." Hence, only ingestible substances are to be weighed with the LSD. Neither the word "ingestible," nor any set of words suggesting the concept of "ingestibility," appear in the statute. By trying to engraft that language onto the statute, the Government is acknowledging

that the meaning it advances of the existing language is not plain.

Accepting for the sake of argument that the Government's interpretation is reasonable, it is not the only reasonable interpretation. As is argued below, a more reasonable interpretation, consistent with the unadulterated language of the statute, would limit statutory "substances" to those which increase the total amount of the product available for distribution. This is the interpretation adopted by the five dissenting judges below and by the court in *Healy*.[1] Because this interpretation is reasonable, and because more than one interpretation of the phrase "mixture or substance" is possible, the Court may look to the legislative purpose to buttress the statute's literal language.

B. Congress Did Not Intend to Make Punishments Depend Upon the Ingestibility of the "Mixture or Substance" to Which LSD is Adhered

The Government proposes a reading of the statute that defines the mixtures or substances that should be weighed together with the LSD as those that are "ingestible." Thus, if a dose of LSD is placed on a pizza, the weight of the pizza would determine the sentence. But if a dose of LSD were adhered to a piece of plastic that is not intended for ingestion, the sentence would be based on the weight of the LSD alone.

Judge Posner demonstrated the fallacy of the Government's argument by hypothesizing a casual user who delivers a single does of LSD to a friend in a glass of orange juice. The user would be subject to a ten year minimum sentence because orange juice is "ingestible." Yet a dealer selling

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[1] Another district court, ruling from the bench at a sentencing hearing, construed the statute to avoid absurd results by excluding LSD carriers from the "mixture or substance" that determines a sentence. *United States v. Mendoza-Macias*, No. 89-0932-01-T (S.D. Cal.) (Turrentine, J.). An appeal of that decision is pending before the U.S. Court of Appeals for the Ninth Circuit. *United States v. Mendoza-Macias*, No. 90-50235 (9th Cir.).

199,999 doses on a carrier that is not ingestible, or that is not adhered to a carrier, would be subject only to the five year minimum. J.A. 77 (Posner, J., dissenting).

Nonsensical results such as these illustrate the untenability of the Government's position. Even more telling is the Government's failure to explain *why* use of an ingestible carrier merits a more severe sentence than use of a noningestible carrier, or no carrier. No rational explanation can be imagined.

The Government's interpretation of the statutory language cannot be reconciled with any rational purpose that the statute may have. Hence, the Government's interpretation is specious, for we must assume Congress acted rationally and with a purpose. The Government fails to understand why Congress included the "mixture or substance" language in 21 U.S.C. § 841(b)(1). The language is intended to assure that a dealer who multiplies the amount of a drug to be marketed by "cutting" or mixing the drug with another substance will be sentenced with a view to the larger number of customers who can be supplied because of the cutting agent. *United States v. Holmes*, 838 F.2d 1175, 1177-78 (11th Cir.), *cert. denied*, 486 U.S. 1058 (1988). Blotter paper and other carriers do not increase the numbers of doses of LSD that can be marketed, the number of customers that can be supplied, or the profit derived from the drug. Therefore, the purpose of the statute is not served by including the weight of the LSD carrier in sentencing determinations. Ingestibility has no impact on the number of marketable doses. The Government's failure to show any linkage between the use of an LSD carrier and the social harm caused by use of a cutting agent leads to the rejection of any Congressional intent to include the weight of the carrier, ingestible or otherwise, when determining the weight of a mixture or substance containing LSD.

C. The History of the Statute Supports a Narrow Interpretation of the Phrase "Mixture or Substance" as Applied to LSD

Nothing in the history of 21 U.S.C. § 841(b)(1) supports a legislative intent to distinguish between ingestible carriers

and noningestible carriers. The Government correctly notes that Congress took a "market oriented approach" that enhances punishments for wholesalers and high volume retailers. That approach is not served by punishing dealers who sell a few doses of LSD on a heavy carrier more harshly than dealers who sell many doses of LSD on a light carrier.

The "market" purchases LSD by the dose, not by weight. Sentencing the seller of 100 doses of LSD on blotter paper to twice the term required for an identical seller of 100 doses of LSD on gelatin capsules does not promote a rational "market oriented" system of punishment.[2] The Government can offer no theory to explain why Congress would want such a bizarre result to accrue. The most credible theory is that advanced by Judge Posner in his dissent below: Congress simply did not realize that LSD is sold by the dose, not by weight.[3] J.A. 79 (Posner, J., dissenting).

The best evidence of the legislature's view of LSD is found in the Senate Report accompanying the Criminal Code Reform Act of 1981. While the Act failed to pass, it represented the first attempt to draw "appropriate distinctions between large and casual traffickers." S. Rep. No. 307, 97th Cong., 1st Sess. 868 (1981). Thus, the proposed Act followed the same "market oriented approach" that motivated the Anti-Drug Abuse Act of 1986, which imposed more severe sentences upon "major traffickers" or wholesalers and upon "managers of the retail level traffic" who sell "substantial

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[2] The first offender who sells 100 doses of LSD on blotter paper has a Guideline range of 63 to 78 months, while the first offender who sells 100 doses of LSD on gelatin capsules has a Guideline range of 27-33 months. *See* Petitioners' Br. 11.

[3] Judge Posner's dissent also disposes of the Government's argument that the alternative sentencing provisions for PCP and methamphetamine prove that Congress intended to include LSD carriers in the weight of the entire mixture or substance. The Government's suggestion that enacting rational legislation with regard to PCP and methamphetimines evinces a desire to enact irrational legislation with regard to LSD is unpersuasive. It is more likely that Congress simply did not realize that LSD is not sold by weight. J.A. 79 (Posner, J., dissenting).

street quantities." H.R. Rep. No. 845, 99th Cong., 2d Sess. 11-12 (1986). Because the same sentencing goal motivated both bills, the Criminal Code Reform Act of 1981 illuminates the Congressional view of which "marketers" are sufficiently large to merit enhanced punishments.

The proposed 1981 legislation drew the line between "large" and "casual" traffickers of LSD at 5 grams, an amount that is "approximately 100,000 times the average user dose." S. Rep. No. 307, 97th Cong., 1st Sess. 868 (1981). Congress in 1981 plainly did not intend to base punishments upon the weight of LSD carriers, since 5 grams can equal 100,000 times a .05 milligram dose of LSD only by *excluding* the weight of its carrier. Congress used the same 5 gram threshold for enhanced sentencing when it enacted the Controlled Substances Penalties Amendments Act of 1984. In the Anti-Drug Abuse Act of 1986, Congress created thresholds for enhanced sentences at 1 gram (5 year minimum) and 10 grams (10 year minimum) of LSD. The Government offers no reason to believe Congress intended these thresholds to reflect anything other than 20,000 and 200,000 doses of LSD. Nothing in the legislative history of § 841(b)(1) suggests that Congress wished to impose a 5 year minimum sentence upon sellers of 1,000 doses, such as petitioners, or that it wished to impose a 10 year minimum upon sellers of fewer than 12,000 doses, such as respondent Marshall.

This sentencing structure is "exceptionally harsh by the standards of the modern Western world," J.A. 81 (Posner J., dissenting), and there is no reason to believe Congress intended it to be so. Nothing in the legislative history even hints that Congress viewed LSD as a pernicious threat warranting such extreme concern.[4] If Congress intended to

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[4] As Judge Posner pointed out, respondent Marshall received a 20 year sentence for selling 12,000 doses of LSD. A comparable sentence for the sale of heroin would have required distribution of 10 kilograms, yielding one to two million doses. A comparable sentence for the sale of cocaine would have required distribution of 50 kilograms, yielding 325,000 to five million doses. Yet LSD is a much less dangerous drug than either heroin or cocaine. J.A. 79-80 (Posner, J., dissenting).

impose such disproportionately severe sentences on LSD dealers, it surely would have said so.

The Government argues that the harshness is mitigated by 18 U.S.C. § 3553(b) and by *Guidelines Manual* § 5K2.0, which authorize downward departures from the minimum sentences and from the Guidelines ranges, respectively, in exchange for a defendant's substantial assistance to the Government. The "mitigation" is illusory for two reasons. First, many of the casual dealers snared in this net (those most in need of mitigation) lack information of sufficient quality or timeliness to merit a downward departure, as much as they might like to earn one. Second, petitioner Chapman, who benefitted from a downward departure, was still sentenced to 8½ years for participating in the sale of 1,000 doses. Had the statute been interpreted rationally to exclude the carrier paper, Chapman's *maximum* guideline sentence would have been 46 months, or less than half his actual, "mitigated" sentence. The "mitigation" afforded by a possible downward departure hardly restores rationality to the sentencing scheme.

The Government argues that the Sentencing Commission "followed Congress's lead and graduated sentences according to the weight of the 'mixture or substance' containing the controlled substance, rather than the actual weight of the controlled substance itself." Gov't Br. 15. Contrary to the Government's assertion, the Commission has given no administrative gloss to the statutory language. The Commission never expressed its own opinion whether the weight of an LSD carrier should determine the defendant's sentence. *See* Petitioners' Br. 19-20. The Commission has passively deferred to whatever judicial construction is ultimately given to the statutory language. U.S. Sentencing Commission, *Guidelines Manual* Appendix C, amend. 123, amending § 2D1.1, Comment., Note 1 (Nov. 1, 1989).

While the legislative history is largely silent on the issue, the existing evidence suggests that Congress intended to reserve minimum sentences for sellers of at least 20,000 doses of LSD. The history offers no support for the Government's position that Congress intended the irrational results that

come from ignoring the realities of LSD marketing by basing sentences upon the arbitrary weight of LSD carriers.

D. Rules of Statutory Construction Require Exclusion of LSD Carriers from the Phrase "Mixture or Substance"

The Government argues that the rule of lenity does not apply in this case, because the law is not ambiguous. The Government makes the same argument to avoid the rule that statutes should be construed to avoid questions about their constitutionality.

If the law were not ambiguous, the Government would not be forced to import an "ingestibility" requirement into the phrase "mixture or substance." For the reasons argued above, and as evidenced by the dissents below, by the decision in *Healy*, and by Congressional attempts to rectify the problem, the law can be most reasonably interpreted to exclude LSD carriers, without resort to an "ingestibility" test, and without reaching absurd results. Because the coexistence of any other reasonable construction would render the phrase "mixture or substance" ambiguous, the rule of lenity and the rule avoiding constructions that cast doubt upon a statute's constitutionality require the law to be narrowly construed in the defendant's favor.[5]

Equally applicable is the rule that statutes should be construed to avoid absurd or unreasonable results. *United*

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[5] When Congress has not "plainly and unmistakably" made its intent clear, the rule of lenity requires doubts to be resolved in the defendant's favor, *United States v. Bass*, 404 U.S. 336, 348 (1971). The Supreme Court has described the rule as a "wise principle" that the Court "has long followed." *Id.* The rule applies here because doubts about whether Congress intended to create a sentencing scheme that operates irrationally are real, not manufactured. For the same reason, the rule favoring a construction that avoids doubts about a statute's constitutionality provides appropriate guidance in this case. *Cheek v. United States*, 111 S.Ct. 604, 611 (1991). As Judge Posner noted, the latter rule is particularly applicable when, as here, the constitutional claim would nullify Congressional action. J.A. 83 (Posner, J., dissenting).

States v. American Trucking Asso., 310 U.S. 534, 543-44 (1940). Rather than reflecting upon, or attempting to justify, the absurd sentencing results that must come about when LSD sentences are based upon the arbitrary weight of the carrier, the Government compares the percentage of LSD in blotter paper that carries that drug to the degree of "purity" of other street drugs, such as heroin or cocaine, and concludes that LSD on a carrier may not be much less "pure" than drugs adulterated by a cutting agent. Gov't Br. 27-28. That comparison is meaningless, because heroin and cocaine are sold be weight. LSD is sold by the dose. A dose of LSD is equally "pure" whether it is placed on a sugar cube, on blotter paper, or ingested directly from a pipette.

Mixing heroin or cocaine with other substances not only reduces the purity of the drug, it enlarges the amount of the product to be marketed. Such is not the case with LSD. Thus, comparing the "purity of LSD to the "purity" of drugs sold by weight does nothing to diminish the absurdity of applying a weight-based sentencing scheme to a drug that is not sold by weight.

The Government disparages what it characterizes are petitioners' "appeal to the spiritual dimension of the law" when petitioners suggest that the statute must be viewed as something more than a collection of disparate words to be applied without regard to the real world. Gov't Br. 26. The Supreme Court has recently reaffirmed that "the meaning of language is inherently contextual,"[6] *Moskal v. United States*, 111 S.Ct. 461, 465 (1990), and has long understood that the ultimate goal of statutory construction is to give effect to the

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[6] *See generally*, F. Frankfurter, *Some Reflections on the Reading of Statutes* 6 (1947) (a statute "is not an equation of formula representing a clearly marked process," but an "instrument of government partaking of its practical purpose but also of its infirmities and limitations, of its awkward groping efforts."); Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 868 (1930) ("A statute is neither a literary text nor a divine revelation.").

legislature's purpose.[7] *United States v. Public Utilities Comm'n*, 345 U.S. 295, 315 (1953).

The purpose of the penalty structure enacted by Congress is to punish high volume dealers, both at the wholesale and retail levels, more severely than casual dealers. H.R. Rep. No. 845, 99th Cong., 2d Sess. 11-12 (1986). Basing sentences on the weight or absence of an LSD carrier does nothing to advance that purpose. Moreover, Congress hoped to *eliminate* sentencing disparaties by revising the structure of penalties imposed upon distributors. S. Rep. No. 225, 98th Cong., 1st Sess. 256 (1983). That purpose was also recognized and effectuated by the Sentencing Reform Act of 1984. *See* 18 U.S.C. § 3553(a)(6) (courts must avoid sentencing disparaties among defendants with similar records who commit similar crimes). Imprecise statutory draftsmanship, or absurd readings of literal language, should not be allowed to defeat these purposes.

The construction of 21 U.S.C. § 841(b)(1) adopted by the majority below and advanced by the Government guarantees that LSD sentences will be imposed arbitrarily. The Government cannot explain why Congress would want LSD sentences to be based on a factor that bears no rational relationship to culpability. A reading that yields such an absurd result, unsupported by any manifest intention of Congress, should be rejected in favor of one that reasonably advances the policies and purposes articulated by Congress and that can be supported by a literal reading of the statute. Accordingly, the Supreme Court should hold that LSD carriers are not a "mixture or substance containing" LSD within the meaning of the statute or the Sentencing Guidelines.

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[7] *See also United States v. Whitridge*, 197 U.S. 135, 143 (1905) (Holmes, J.) ("the general purpose is more important than any rule which grammer or formal logic may lay down").

II. BASING A SENTENCE UPON THE WEIGHT OF AN LSD CARRIER VIOLATES A DEFENDANT'S RIGHT TO DUE PROCESS OF LAW

A. Criminal Defendants Have a Fundamental Right to Be Free from Arbitrary Sentences

The Government argues that the fundamental right to liberty ends with a verdict obtained as the result of a procedurally fair trial. At sentencing, the Government contends, the defendant may be given any sentence that is authorized by statute and that is not cruel and unusual. Without explaining why, the Government asserts that this proposition establishes that due process requires only that a sentencing scheme not be arbitrary or irrational. Gov't Br. 30-31. Yet due process protects defendants against unequal treatment at all stages of the criminal justice system, *Griffin v. Illinois*, 351 U.S. 12, 18 (1956), and the requirements of due process must be satisfied at sentencing, as well as at trial, *Gardner v. Florida*, 430 U.S. 349, 358 (1977). If the right to due process at trial is fundamental (which seems inarguable), the right to due process at sentencing – including the right to be free from arbitrary governmental action – is equally fundamental.

The cases relied upon by the Government do not focus on the standard of review that applies to a claim that a sentencing scheme is driven by an unconstitutionally arbitrary factor.[8] Nor does the Government address the general

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[8] *Stanford v. Kentucky*, 109 S.Ct. 2969 (1989), did not decide what standard of review should apply to an equal protection challenge to a sentencing scheme because no such challenge was made. *Stanford* was decided under Eighth Amendment standards rather than Fifth Amendment standards. While *Dobbert v. Florida*, 432 U.S. 282 (1977) and *Finley v. California*, 222 U.S. 28 (1911) concerned equal protection claims, the Court did not address the appropriate standard of review and was not asked to determine whether a fundamental right had been violated. *Marshall v. United States*, 414 U.S. 417 (1974), held only that there is no fundamental right to rehabilitation from narcotics addiction at public expense after conviction of a crime. *McGinnis v. Royster*, 410 U.S. 263 (1973), concerned a post-sentencing administrative determination of an

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proposition that a legislative classification resulting in imprisonment differs in character from legislative classifications that have no such impact on fundamental rights, to which a rational basis standard of review appropriately applies.

Other rights that have been deemed fundamental, such as the right to travel, are no more important to an individual in a free society than the right to have the length of a governmentally sanctioned deprivation of liberty be determined in a nonarbitrary way. If a defendant received a lengthy sentence because of the color of her eyes or the size of her shoes, the public would be shocked, and courts would quickly agree that the right to have a sentence determined by factors that are relevant, not arbitrary, is fundamental to a criminal justice system that reflects ordered liberty. Basing a sentence upon the weight of an LSD carrier is no less arbitrary, and the right it infringes upon is no less fundamental.

The Government recognizes that due process prohibits arbitrary or irrational sentencing schemes. Gov't Br. 31. The right to be free from such schemes – the right to be sentenced fairly – is fundamental. 2 R. Rotunda, J. Nowak & J. Young. *Treatise on Constitutional Law: Substance and Procedure* § 18.41 at 703 (1986). A claim that a sentencing scheme violates that standard must therefore be strictly scrutinized.

B. Basing a Sentence on an Arbitrary Factor Violates a Defendant's Right to Due Process and Equal Protection of the Law

The Government relies on several arguments to suggest that the sentencing scheme applicable to LSD is rational. None of the arguments withstand any level of scrutiny.

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award of "good time" credit toward service of a sentence. *Leary v. United States*, 395 U.S. 6 (1969), *Turner v. United States*, 396 U.S. 398 (1970), and *Tot v. United States*, 319 U.S. 463 (1943), focused on evidentiary presumptions and have nothing to do with the right to fairness in sentencing.

1. The Government first argues that measuring drugs according to "street weight" rationally increases the penalty "for persons who possess large quantities of drugs, regardless of their purity." Gov't Br. 31.[9] That contention is true only when the drug is sold by weight. The weight of an LSD carrier bears no rational relationship to the only quantity – the number of doses – that is relevant to culpability. The purveyor of a single dose of LSD on a sugar cube weighing 2.27 grams will receive a longer sentence than the dealer who sells 100 doses of LSD on blotter paper with a total weight of 1.4 grams. The dealer who sells 100 doses of LSD on blotter paper will receive a longer sentence than the distributor who sells 400 doses of LSD on gelatin capsules or the wholesaler who sells 10,000 doses of LSD in liquid form. *See* Petitioner's Br. 9-11. There is simply no rational relationship between the combined weight of LSD and its carrier and the relevant measure of quantity of LSD sales.

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[9] The Government cites several cases for the proposition that the sentencing scheme is rational. *See* Gov't Br. 31 n. 15. Most of those cases deal with drugs that are sold by weight. *United States v. Mendes*, 912 F.2d 434 (10th Cir. 1990) (cocaine and heroin); *United States v. Mendoza*, 876 F.2d 639 (8th Cir. 1989) (cocaine); *United States v. Holmes*, 838 F.2d 1175 (11th Cir.), *cert. denied*, 486 U.S. 1058 (1988) (cocaine); *United States v. Klein*, 860 F.2d 1489 (9th Cir. 1988); *United States v. Hoyt*, 879 F.2d 505 (9th Cir. 1989) (cocaine); *United States v. Savinovich*, 845 F.2d 832 (9th Cir.), *cert. denied*, 488 U.S. 943 (1988) (cocaine); *United States v. Ramos*, 861 F.2d 228 (9th Cir. 1988) (cocaine). Defendant agrees that the sentencing scheme is rational when applied to a drug that is sold by weight, because increasing the total weight increases the total volume of the substance that can be marketed. That distinction is not recognized by the other cases cited by the Government, and the reasoning of those cases is therefore faulty. *United States v. Bishop*, 894 F.2d 981 (8th Cir. 1990) (LSD); *United States v. Murphy*, 899 F.2d 714 (8th Cir. 1990) (methamphetamine, relying on *Bishop*).

2. The Government argues that weighing the LSD carrier is rational because the combined weight of the LSD and its carrier "serves as a rough proxy for the size of the defendant's criminal enterprise." Gov't Br. 33. The Government is mistaken. The size of an LSD enterprise can be determined only by the number of doses possessed or sold, not by the weight or absence of the carrier holding those doses. The dealer who holds one thousand doses on blotter paper is not conducting a larger enterprise than the dealer who holds one thousand doses on gelatin capsules. In fact, since the dealers who are highest in the distribution chain are least likely to use a carrier at all, *lesser* weights may serve as a "rough proxy" for *greater* culpability.

3. The Government contends that it is "typically" true that "diluting a drug increases the trafficker's profits and allows him to distribute his wares more widely," making it rational to base a sentence on the combined weight of the drug and dilutant. Gov't Br. 32. While that may be typically true of drugs that are sold by weight. it is not true of LSD. Placing a dose of LSD on a carrier does not dilute the dose. A single dose of LSD on blotter paper is the same as a dose of LSD on a gelatin capsule, a sugar cube, or in liquid form. Placing a dose of LSD on a heavier carrier does not allow the dose to be distributed more widely than does placing the dose on a lighter carrier, or than distributing the dose in liquid form. One dose is still one dose.

4. The Government argues that, in conspiracy and attempt cases, it is "far simpler" to charge the defendant with the weight of the drug the defendant agrees to sell than it is to determine the actual weight of the unrecovered drug. Again, that reasoning is sound only if the drug is sold by weight, and has no application to conspiracies or attempts to sell LSD. In an LSD conspiracy where the drug is not recovered, neither the seller nor the buyer will know (or care about) the weight of the LSD and its carrier, because LSD is not sold by weight. The parties will know only the number of doses that the defendant agreed to sell. The defendant's sentence will then be based on the weight of the LSD alone, without reference to the carrier. *See Guidelines Manual* § 2D1.1, comment. (n.11).

Ironically, this is one of the reasons that the sentencing scheme is unconstitutionally arbitrary. As petitioners argued, sentencing LSD defendants who have sold (or agreed or attempted to sell) a known number of doses of LSD less severely because the weight of the LSD carriers is unknown creates an irrational classification for sentencing purposes that violates the right to equal protection of the law. Petitioners' Br. 42-43. The Government does not respond to that argument.

5. Petitioners also contend that it is irrational to subject dealers at the top of the distribution chain, who possess LSD in pure liquid form, to less severe sentences than low level dealers who sell small amounts on heavy carriers. The Government responds that the big fish will "not necessarily" evade the net of harsh sentencing, because they may be prosecuted for conducting a continuing criminal enterprise under 21 U.S.C. § 848, and because they may be subject to an upward departure from their Guideline range for selling a drug in an "unusually pure" form pursuant to *Guidelines Manual*, § 2D1.1, comment. (n.9). The fact that the Government *might* occasionally be able to prove the existence of a continuing criminal enterprise provides small comfort for the casual dealer who is subjected to mandatory minimum sentences for selling a few doses of LSD on a heavy carrier. Since purity is not a consideration with regard to LSD – a dose of LSD on blotter paper is just as "pure" as a dose of LSD on a gelatin capsule or a dose of LSD in liquid form in a vial – reliance on the possibility of a purity adjustment is misplaced.

6. The Government argues that the sentencing scheme has not produced "an arbitrary array of sentences." Gov't Br. 33. The government ignores the concrete examples of arbitrariness in petitioner's brief. Petitioner's Br. 40. Unjust results abound. Judge Posner points to a defendant (Dean) who sold 198 doses of LSD on blotter paper for $73.00 and received a six year sentence, a particularly lengthy term compared to those imposed on sellers of small amounts of other drugs. J.A. 78, 81 (Posner, J., dissenting). Jonathan Fuller sold 300 doses on blotter paper for $375 and was

sentenced to 95 months. Had the blotter paper weight been excluded, his guideline sentencing range would have been 12 to 18 months. *See* App. Br. 3-4, *United States v. Fuller*, No. 90-1299 (1st Cir., appeal filed Mar. 29, 1990).

In some cases, by contrast, defendants have been sentenced according to the weight of the LSD without regard to the weight of the carrier. *See, e.g., United States v. Johnson*, 888 F.2d 1255, 1256 (8th Cir. 1989) (weight of 4,300 doses of LSD found to be 430 mg.); *United States v. Mendoza-Macias*, *supra* n. 1 (excluding carrier weight).[10]

Two other cases illustrate the bizarre results that are possible under this sentencing scheme. In the first, Christopher Brown was sentenced for three separate deliveries of 500, 1,000, and 3,400 doses of LSD respectively, all on blotter paper. He was also sentenced for conspiring to deliver 10,000 doses that were never recovered or delivered. The trial court, having no actual weight for the 10,000 doses, used the "Typical Weight Per Unit Table" in *Guidelines Manual* § 2D1.1, comment. (n.11), to calculate the weight of those doses without reference to a carrier weight. Because there was a dispute about the actual weight of the LSD and its carrier, the court also used the table to calculate the weight of the 3,400 doses of LSD. Brown's sentence for the 500 and 1,000 doses, however, was based on the weight of the LSD plus its carrier. Thus, Brown's 100 month sentence was based on some, but not all, of the carriers that Brown possessed. App. Br. 2-4, 9-13, *United States v. Brown*, No. 90-1482 (6th Cir., appeal filed Apr. 16, 1990). This result defies logic.

In the second case, there was testimony that (1) five vials of liquid LSD were purchased for $325.00; (2) 100 doses of LSD on a sheet of paper were purchased for $250.00; (3)

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[10] *See also* the plea agreement in *United States v. Stavely*, No. 89-189-Cr-Orl-18 (M.D. Fla.), entered into on October 24, 1989, in which the Government agreed that defendant's sentence should be based on the actual weight of 50,000 doses of LSD, between 4 and 6.9 grams, without regard to the weight of the LSD carrier. It seems that even the Justice Department is unable to formulate a consistent position in LSD sentencing cases.

sugar cubes with drops of LSD were provided in lieu of other sheets of paper with LSD; and (4) a person took some LSD in liquid form by dropping LSD onto his eyeball. *United States v. Hanlin*, No. 90-6 Erie (W.D. Pa.), tried June 25, 1990. In this situation, it would be necessary, under the Government's view, to impose the lengthiest sentence for possession of a few sugar cubes, followed by a shorter sentence for possession of the paper, followed by a shorter sentence for possession of the pure liquid LSD. Bizarre examples such as this will only multiply as time goes on.

Contrary to the Government's argument, the petitioners do not rely on "curious hypothetical cases," nor do they attempt to assert the rights of dealers who use exceptionally heavy carriers. Rather, petitioners have demonstrated that the law classifies all LSD dealers by reference to an arbitrary factor. Dealers who use heavier blotter paper risk longer sentences than dealers who use lighter blotter paper.[11] Dealers who use blotter paper will be sentenced more harshly than equally culpable dealers who use gelatin capsules. As Judge Posner pointed out, the petitioners are entitled to compare their own situations to those of equally culpable persons who are classified differently, and treated more favorably, by the law. Comparisons to persons who are treated less favorably, such as sugar cube dealers, are also "relevant to exploring the logic behind the scheme of punishment – and show that there is none." J.A. 85 (Posner, J., dissenting).

7. The Government responds to evidence of arbitrariness by suggesting that defendants choose their own poison when they decide to use a heavier carrier. That argument overlooks a crucial failing of arbitrary statutes: they provide no notice of the proscribed conduct.[12] It is unlikely that LSD

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[11] The survey of blotter paper weights in petitioner's brief demonstrates that a single square of paper may weigh from 5.5 mg. to 15.4 mg. Petitioner's Br. 10 n.7.

[12] This lack of notice is one of the policies upon which the rule of lenity is founded. *United States v. Bass*, 404 U.S. 336, 348 (1971).

dealers reading the law knew that they would be subject to more severe sentences if they used heavier carriers. If the Government's interpretation is adopted, however, knowledgeable dealers will simply resort to carriers that are not intended to be ingested, or will market the LSD and the carriers separately, leaving it to the ultimate user or to a small volume street dealer to adhere the LSD to its carrier. The argument that the Government may sentence offenders arbitrarily because offenders choose their own carriers simply fails to contend with the constitutional inadequacies of the law or the realities of the marketplace.

8. The Government also seeks to compare this sentencing scheme to a hypothetical scheme in which a determinate sentence is imposed for distributing *any* quantity of LSD in any form. Gov't Br. 35. The comparison is not fruitful, because such a sentencing scheme would not base sentences upon an arbitrary factor. The irrational results compelled by the current sentencing scheme simply cannot be justified in a constitutional system that requires deprivations of liberty to be undertaken in a rational manner.

None of the Government's arguments confront the central constitutional issue raised in this appeal. Two LSD distributors with identical criminal records selling the same number of doses of LSD of identical purity will be sentenced differently if they use carriers of different weights. It would be hard to imagine a way to violate the right to equal protection of the law that is more intuitively unjust than this. If basing sentences upon the arbitrary weight of an LSD carrier does not violate due process, then the due process guarantee against arbitrary and irrational governmental action is meaningless.

The LSD sentencing scheme cannot survive the strict scrutiny it warrants. Even if the right to be free from arbitrary sentencing were not fundamental, however, no rational explanation could be posited to save the scheme from its constitutional infirmity.

CONCLUSION

For the reasons stated, the judgments below should be reversed and remanded for new sentencing proceedings. The lower court should be directed to sentence the defendants without regard to the ,weight of the blotter paper that carried the LSD.

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